

1 THE HONORABLE THOMAS S. ZILLY
2
3
4

5 UNITED STATES DISTRICT COURT
6 FOR THE WESTERN DISTRICT OF WASHINGTON

7 BUNGIE, INC., a Delaware corporation,

8 Plaintiff

9 v.

10
11 AIMJUNKIES.COM, a business of unknown
12 classification; PHOENIX DIGITAL GROUP
13 LLC, an Arizona limited liability company;
14 JEFFREY CONWAY, an individual; DAVID
15 SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

16 Cause No. 2:21-cv-0811 TSZ
17
18

DEFENDANTS' TRIAL BRIEF

19
20 Defendants Aimjunkies.com, Phoenix Digital Group LLC, Jeffrey Conway, David
21 Schaefer, Jordan Green and James May, through their undersigned counsel, hereby submit
22 this Trial Brief in advance of the trial currently scheduled for Monday, December 4, 2023.

23
24 **INTRODUCTION**

25 This is a case of litigation gone wild. This case should never have progressed this far
26 and why Plaintiff Bungie, Inc., continues to pursue it, even against its own interests, remains a
27 mystery.

28 Bungie, as part of an ongoing and self-admitted campaign “to put cheaters and those
29 who assist them on notice that Bungie does not and will not tolerate cheating in Destiny 2,”
30 brought this action as one of several highly publicized cases it has filed against several
31 domestic individuals, overseas foreign nationals, and even teenage minor children it has,

1 largely without foundation, accused of making, distributing and/or using what it calls, “cheat
 2 software” configured for use with Bungie’s “Destiny 2” first-person shooter game. In all
 3 cases except this one, the targets of Bungie’s lawsuits have either defaulted without a fight, or
 4 have agreed to multi-million dollar “judgments” against them before ever getting anywhere
 5 close to an actual trial on the merits. Although the terms of any behind the scenes settlement
 6 agreements remain confidential, it is clear to any reasonably experienced lawyer that it is
 7 doubtful that any of these defendants, who are obviously not rich, have actually paid any of
 8 these well publicized “judgments” against them, and that they are likely largely for show.

9 What sets the Defendants here apart is that they are, apparently, the first and only ones
 10 to point out that there is no law whatsoever proscribing “cheating” in computer games, and
 11 that Bungie, Inc., as with any other plaintiff, must prove an actual violation of an established
 12 and recognized intellectual property right, such as copyright, in order to maintain a legally
 13 proper and permissible action against those it accuses of “cheating.”

14 After two-and-one-half years of litigation, Bungie’s case before this Court has now
 15 been winnowed down to a single claim of copyright infringement based on a “cheat” software
 16 product that Phoenix Digital distributed between November 2019 and February, 2021.
 17 During that roughly fourteen month period, which ended when Phoenix Digital voluntarily
 18 removed the subject software from its product line after receiving Bungie’s “cease and desist
 19 letter” in November, 2020, Phoenix Digital distributed fewer than 1500 units of the subject
 20 software and received gross revenues as a result of such distribution of less than \$65,000.
 21 Bungie’s profits on these sales are less than \$10,000.

22 To put this in perspective, Bungie has informed this very Court that it spent in excess
 23 of \$17,000 to take a single deposition of a witness who had already been deposed at least
 24 three times before, and whose deposition lasted all of two hours, fifty-two minutes, while
 25 thereafter spending over \$35,000 to take the deposition of Defendants’ single expert witness
 26 who expressed but three opinions and submitted a seven page expert report. This case is
 27 obviously not about Bungie’s attempting to stop distribution of the subject “cheat” software.
 28

1 That was achieved nearly three years ago when Phoenix Digital voluntarily stopped
 2 distributing the software after receiving Bungie's demand that it do so. Nor is it about Bungie
 3 seeking to be "made whole" as a result of the accused copyright infringement -- Defendants
 4 can never hope to pay the millions of dollars in legal fees racked up by Bungie, even if
 5 Bungie were somehow to succeed in its flimsy claims.

6 Why, then, are we here? Clearly it is because Bungie, having launched a publicity
 7 campaign and having brought a baseless claim of copyright infringement against the
 8 Defendants, cannot now publicly back down and admit its case lacks merit. In a classic case
 9 of sending good money after bad, Bungie is forced to continue, even though it has nothing to
 10 gain by so doing and even though this case stopped making sense long ago.

11 Ironically, as part of its vicious campaign against Defendants, Bungie, *itself*, has
 12 stepped out of line and broken the law. In particular, discovery has shown that, in the course
 13 of investigating Defendant James May, Bungie, whether by itself or through its agents,
 14 bypassed Mr. May's security measures and accessed and downloaded personal, copyrighted
 15 files of Mr. May. Bungie will claim at trial that the Bungie "Limited Software License
 16 Agreement" Mr. May agreed to permits Bungie to do what it did. However, a simple reading
 17 of that Agreement shows this is not true, and that the limited scope Mr. May agreed to did not
 18 extend to the files Bungie improperly accessed. This is the subject of Mr. May's counterclaim
 19 against Bungie that will also be addressed at trial.

20 BUNGIES' REMAINING CLAIM

21 A few short days ago, Bungie, for the very first time, sensibly notified Defendants that
 22 Bungie would not be pursuing its clearly baseless claims for trademark infringement and false
 23 designation of origin.¹ This leaves Bungie with a single claim for copyright infringement.

24 Similarly, and no doubt recognizing that it failed to secure registrations for its
 25 copyrights in time to claim statutory damages and attorneys' fees, Bungie has also dropped its
 26

27 ¹ Did Bungie seriously think a jury would buy the argument that consumers could reasonably be
 28 confused into thinking *Bungie* was the source of the subject "cheat" software?

1 claim for statutory damages and recently indicated it would be seeking only “actual damages”
 2 in the event it succeeds at trial. Given that Bungie’s *own* damages expert, Mr. Drew Voth,
 3 opines that Phoenix Digital received less than \$50,000 in gross receipts for *all* distributions of
 4 the subject “cheat” software, and given that Phoenix Digital’s actual profit on such
 5 distributions was less than \$10,000, at best, Bungie might obtain less than one-third of what it
 6 claims to have spent taking a single deposition in this matter.

7 Throughout its initial and amended complaints, Bungie identifies *only* the “cheat
 8 software” that is used directly with Bungie’s “Destiny 2” and “Destiny 2: Beyond Light”
 9 games as the software supposedly infringing its copyrights. Neither complaint makes any
 10 mention whatsoever of a “loader” as being an infringing product, and claims directed to such
 11 a “loader” product are not properly before this Court.

12 Evidence at trial will show that Phoenix Digital distributed the subject “cheat
 13 software” between November, 2019 and February, 2021. David Schaefer will testify that
 14 Phoenix Digital had a long-standing policy of removing “cheat” software from its product line
 15 on those highly rare occasions a game manufacturer registered a complaint. Mr. Schaefer will
 16 testify that Phoenix Digital adhered to this policy at all relevant times herein.

17 Mr. Schaefer will further testify that, upon receiving a “cease and desist” letter from
 18 Bungie’s counsel in November, 2020, Phoenix Digital voluntarily took immediate steps to
 19 remove the subject Destiny 2 “cheat” software from Phoenix Digital’s product line. This was
 20 fully accomplished by January/February, 2021. Mr. Schaefer will also testify that the subject
 21 “cheat” software distributed between November, 2019 and February, 2021 was the only
 22 “cheat” product ever distributed by Phoenix Digital directed to a game created, sold,
 23 distributed, etc., by Bungie, Inc.

24 Despite having complied with the “cease and desist” demands made in Bungie’s
 25 November, 2020 letter, Bungie sued Defendants in June, 2021, long after Phoenix Digital
 26 voluntarily ceased distribution of the subject “cheat” software. Again, this was likely done as
 27
 28

1 part of Bungie's well-publicized campaign against, "cheaters" and was apparently done
 2 without any sort of pre-filing investigation on the part of Bungie.

3 It will be established at trial that no one connected with Phoenix Digital developed the
 4 "cheat" software at issue in this case. On the contrary, the subject software was developed by
 5 an unknown, Ukrainian-based developer known only under the likely fictitious name,
 6 "Andreas Banek." In the course of discovery, Defendants have voluntarily provided all
 7 information and contact information they have regarding the identity and whereabouts of Mr.
 8 Banek. Despite such disclosure on the part of Phoenix Digital, Bungie has made no effort
 9 whatsoever to track down Mr. Banek, who is obviously a material witness and likely
 10 necessary party to this action. Defendants have in no way interfered with any efforts on the
 11 part of Bungie to track down or otherwise communicate with Mr. Banek.

12 Significantly, neither Bungie nor any of the Defendants has actually seen or analyzed
 13 the source-code for the "cheat" software at issue. Mr. Schaefer will testify that Phoenix
 14 Digital does not create "cheats" itself but, rather, serves as a distribution platform for "cheats"
 15 created by others, much the way Amazon distributes the products of others. Mr. Schaefer will
 16 testify that during distribution of the "cheat" software, Phoenix Digital never has physical
 17 possession of the software. Instead, when a customer "purchases" a subscription to a
 18 particular game "cheat," the customer, in return for a subscription payment, is provided with a
 19 link that enables him to download the "cheat" directly from the developer. Again, Phoenix
 20 Digital never had possession of the "cheat" software at issue here.

21 Mr. Schaefer will testify that Phoenix Digital splits gross proceeds with the developer
 22 50-50, leaving Phoenix Digital with 50% of the gross. From this, Phoenix Digital pays
 23 overhead and other expenses. The remaining "profit," which is typically far less than 25% of
 24 the gross, is then divided up among the initially three, and then later two founders of Phoenix
 25 Digital. Mr. Schaefer will testify, and Mr. May will confirm, that none of the revenues
 26 Phoenix Digital received through distribution of the subject "cheat" software here was ever
 27 shared with Mr. May.

In its claim, Bungie contends that a “cheat” software product that it never fully possessed, that it has not forensically analyzed, and that it has played on only a single occasion “for about ten minutes” nevertheless copies the software code it claims is the subject of its copyrights. Bungie apparently hopes the Jury will accept this on faith rather than offer competent evidence of any such copying.

MR. MAY'S COUNTERCLAIM

During the course of discovery, it became apparent that on at least one-hundred occasions, Bungie, either itself or through its agents, accessed the personal computer of Defendant James May and, without his authorization, accessed one or more copyrighted works on his personal computer. This is the basis for Mr. May's counterclaim for circumvention of technological measures. In particular, Mr. May will show that Bungie employed unfair means to circumvent technology Mr. May, like tens of millions of other owners of personal computers, use to restrict access to their private files.

Without limitation, Mr. May's contention is, in part, that Bungie circumvented Mr. May's firewall and password protocols by exceeding the authority Mr. May had granted to Bungie to make limited access to Mr. May's computer. In short, Bungie used deceit and false promises to bypass and avoid the technological measures Mr. May employed to protect his private files.

THE PARTIES

This case names five defendants, namely Aimjunkies.com, Phoenix Digital Group, LLC, Jeffrey Conway, David Schaefer, Jordan Green and James May.

Aimjunkies.com, which never existed as a formal, separate legal entity, was a website operated by Phoenix Digital up until May, 2022 when it was sold to an overseas purchaser. As of May, 2022, none of the remaining Defendants operates or controls the aimjunkies.com website.

1 Phoenix Digital Group, LLC is a Delaware Limited Liability Corporation, initially
 2 organized and formed by Defendants Schaefer, Conway and Green, and currently owned by
 3 Mr. Schaefer and Mr. Green.

4 Defendants Jordan Green and David Schaefer are the two current owners of Phoenix
 5 Digital, and were two of the three initial founders of Phoenix Digital.

6 Defendant Jeffrey Conway was one of the three individual founders of Phoenix Digital
 7 and was once a co-owner of Phoenix Digital. Mr. Conway resigned from Phoenix Digital in
 8 March, 2021 and is no longer a part of Phoenix Digital.

9 Defendant James May is an individual residing in Toledo Ohio. Mr. Green is a
 10 software developer who is neither an owner, founder, officer, director, employee or otherwise
 11 a part of Phoenix Digital. From time to time, Mr. May has developed “cheats” for games
 12 other than Destiny 2 that were distributed by Phoenix Digital. Mr. May did not create,
 13 develop or otherwise participate in the creation or distribution of the “cheat” software that is
 14 at issue in this case, nor did he have a financial interest in such software or otherwise derive
 15 revenues from distribution of the subject “cheat” software.

16 **CLAIMS AND DEFENSES**

17 **A. Distribution of the Subject Software and Profits Derived Therefrom**

18 Phoenix Digital does not contest that it distributed the subject “cheat” software
 19 between November, 2019 and February, 2021. Phoenix Digital does not contest that it
 20 derived up to \$65,000 in gross revenues for such distribution of the subject software. These
 21 are undisputed matters and a trial as to these matters is both unnecessary and wasteful.

22 Given Bungie’s wise election not to seek statutory damages in this matter, and given
 23 that “actual damages” in the form of Phoenix Digital’s profits remain the best measure of
 24 damages should liability somehow be found, extensive testimony as to damages is again
 25 unnecessary and wasteful as, given the *di minimis* amount, a stipulated figure should be
 26 sought and obtained in the unlikely event Bungie is able to demonstrate copyright
 27 infringement.

1 **B. Copyright Infringement**

2 Bungie will not be able to make the requisite showings needed to establish copyright
 3 infringement. At trial, no Bungie witness will (credibly) testify that he actually saw the code
 4 making up the accused “cheat” software. At trial, no Bungie witness will testify that he did
 5 more than simply use the “cheat” software for about ten minutes. No Bungie witness will
 6 testify he actually knows what is in the accused “cheat” software or how it operates. At best,
 7 a Bungie witness will testify that the accused “cheat software” *must* infringe for the simple
 8 reason he can’t (or won’t) think of any other way a “cheat” program could be implemented.
 9 Bungie’s case for infringement will be based on nothing more than simple guesswork and
 10 unfounded accusation. It will not be based on competent evidence.

11 Significantly, no Bungie witness will demonstrate the “substantial similarity” that is
 12 needed to make a viable claim of copyright infringement. Significantly, no Bungie witness
 13 will demonstrate the “access” that is needed to make such a claim either. Instead, Bungie
 14 will use ill-defined jargon, such as ill-defined “code” that “injects itself” into the game, in an
 15 effort to bamboozle both this Court and the Jury. When pressed, Bungie will be unable to
 16 define exactly what these terms mean and, more importantly, how they show copying.

17 Nor will Bungie be able to show how, exactly, any or all of the Defendants supposedly
 18 copied Bungie’s copyrighted works. Bungie makes shotgun claims that Defendants,
 19 “directly,” “contributorily” and/or “vicariously” infringed its copyrights. Bungie will be left
 20 to its proofs as to what each such claim requires and how each accused Defendant supposedly
 21 engaged in the proscribed conduct.

22 In the case of James May, Mr. May will testify, and Phoenix Digital will confirm, that
 23 Mr. May had absolutely nothing to do with creating the “cheat” software that is the subject of
 24 this action, and that all “cheat” software actually created by him and distributed by Phoenix
 25 Digital was for games other than “Destiny 2” and games other than those created and
 26 distributed by Bungie. Mr. May is innocent of any of any claim of copyright infringement –
 27 the only claim being pursued by Bungie here – and should not be here in the first place. He

1 simply did not create the “cheat” software at issue here, did not participate in the distribution
 2 of the software, and did not derive any economic benefit from such distribution. Indeed, he is
 3 not and never has been a part of Phoenix Digital. He is simply a third-party “cheat” developer
 4 who has from time to time marketed his products using the Phoenix Digital service.
 5 Significantly, *none* of those products he has distributed through Phoenix Digital are directed
 6 toward any Bungie game or product. Mr. May’s distribution of unrelated “cheats” makes him
 7 no more a part of Phoenix Digital than merely selling products through Amazon makes all
 8 such tens of millions of sellers senior executives with Amazon.

9 **C. Mr. May’s Counterclaim**

10 In its blind zeal to file lawsuits against cheaters and “put cheaters and those who assist
 11 them on notice that Bungie does not and will not tolerate cheating in Destiny 2,” Bungie,
 12 itself, has broken not only the law but the trust of the millions of players of its games who,
 13 perhaps naively, think that Bungie will abide by the terms of its own terms of use and not spy
 14 on those who sign up for an account and play the game. In particular, documents produced by
 15 Bungie itself establish that on more than one-hundred occasions, Bungie accessed Mr. May’s
 16 personal computer far beyond the limits Mr. May had agreed to and secretly downloaded
 17 copyrighted files on Mr. May’s computer. This will be established through the direct
 18 testimony of Mr. May himself, as well as Mr. May’s expert witness, Brad A. LaPorte. This
 19 will be further demonstrated and corroborated by documents actually created and produced by
 20 *Bungie*.

21 Against these clear facts, Bungie will offer shotgun defenses along the familiar lines
 22 of, (1) “We didn’t do it,” (2) “Someone else did it” and (3) “Even if we did do it, you let us do
 23 it.” In particular, Bungie is expected to argue, simultaneously, that no one accessed Mr.
 24 May’s computer, that if someone did access Mr. May’s computer, it was a third-party that did
 25 so, and that even if Bungie obtained private information from Mr. May’s computer, Mr. May
 26 authorized it by agreeing to Bungie’s Limited Software License Agreement.

1 Bungie is expected (and if permitted by the Court) to argue that none of the works
 2 improperly accessed by Bungie on Mr. May's computer is "copyrighted." Although Mr. May
 3 agrees that none of the works on his computer is the subject of a formal copyright registration,
 4 such registration is not needed in order for a violation of the DMCA to occur. Mr. May is
 5 expected to testify that he authored some of the subject works and, therefore, owns copyrights
 6 in them under applicable copyright law. Mr. May will further testify that other works on his
 7 computer and accessed by Bungie are the copyrighted works of Phoenix Digital. Again,
 8 formal registration is not necessary for these works to be the subject of a claim under the
 9 DMCA, and it is not legally necessary for Mr. May to own the copyrights in the copyrighted
 10 work(s) improperly accessed by Bungie.

11 As a further result of Bungie's violation of Mr. May's rights, it will be apparent that
 12 Bungie comes to court with unclean hands. Whether Bungie should be rewarded for itself
 13 engaging in the very type of improper tactics it accuses others of using is an issue directly
 14 raised by Bungie's own actions.

15 **DAMAGES**

16 As previously noted, the available damages under any theory of law presented in this
 17 simple, uncomplicated claim for copyright infringement have long been dwarfed by the
 18 attorneys' fees Bungie has voluntarily elected for itself and unfairly imposed on Defendants.
 19 Bungie cannot show, and heretofore has not even attempted to show, that it, itself, incurred
 20 any actual, quantifiable harm as a result of Phoenix Digital's actions, even if those actions are
 21 hypothetically viewed as "infringing," which Bungie has not and cannot prove. Under clearly
 22 established law, Bungie, at best, would receive Defendants' "profits," which Bungie's own
 23 expert witness *agrees* can be no more than \$60,000 and, in reality, are far less than that.

24 As is not even seriously disputed by Bungie, itself, Defendants long ago voluntarily
 25 removed the subject "cheat" software from their product line shortly after receiving Bungie's
 26 "cease and desist" letter in November, 2019, and they have not, and will not, either re-
 27 introduce the product to the market or offer any other product to be used with Destiny 2 or
 28

1 any other game offered by Bungie. This was presented to Bungie long ago, and has even been
2 made formal by the preliminary injunction this Court issued early in the case and as to which
3 Defendants have complied with completely. Why a four day jury trial in federal court is
4 needed to address less than \$10,000 in potential damages ostensibly resulting from a short-
5 lived, no longer extant product *that no longer appears* in the Phoenix Digital product line and
6 *that never caused any actual harm whatsoever* to Bungie, has not been explained.

7 Dated November 9, 2023.

8 /s/ Philip P. Mann

9 Philip P. Mann, WSBA No: 28860
10 **Mann Law Group PLLC**
11 403 Madison Ave. N. Ste. 240
12 Bainbridge Island, Washington 98110
13 Phone (206) 436-0900
14 phil@mannlawgroup.com
15 Attorneys for Defendants